89-1853

No. _____

Supreme Court, U.S.
FILED
MAY 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANK W. SNEPP, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM H. ALLEN
MARK H. LYNCH *
STEVEN F. REICH
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Petitioner

* Counsel of Record

May 29, 1990

QUESTION PRESENTED

Where a former employee of the Central Intelligence Agency submits his writings to the Agency for prepublication review and the Agency withholds approval for publication, is the burden of seeking judicial review on the Agency, as this Court held in *Snepp* v. *United States*, 444 U.S. 507, 513 n.8 (1980), or on the employee, as the court below held.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
A. Introduction	2
B. The Prior Litigation	2
C. The Present Controversy	5
D. The Current Litigation	6
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	19

TABLE OF AUTHORITIES

Cases: Page

Alfred A. Knopf, Inc. v. *Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975) 17, 18
FW/PBS, Inc. v. *City of Dallas*, 110 S. Ct. 596 (1990) 12, 13
Freedman v. *Maryland*, 380 U.S. 51 (1965) 4, 12, 13
McGehee v. *Casey*, 718 F.2d 1137 (D.C. Cir. 1983) 17, 18
Snepp v. *United States*, 444 U.S. 507 (1980) ..... *passim*
Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 12
Times Film Corp. v. *City of Chicago*, 365 U.S. 43 (1961) 11
United States v. *Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) 2, 3
United States v. *Snepp*, 456 F. Supp. 176 (E.D. Va. 1978) 3
United States v. *Snepp*, 595 F.2d 926 (4th Cir. 1979) 5
Webster v. *Doe*, 486 U.S. 592 (1988) 18

Statutes:

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 7
28 U.S.C. § 1345 7

Miscellaneous:

Congress and the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Government Operations, 100th Cong., 2d Sess. (1988) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ———

FRANK W. SNEPP, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Frank W. Snepp, III, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a) is reported at 897 F.2d 138. The district court's oral opinion (App. 13a-18a) has not been reported.

JURISDICTION

The judgment of the court of appeals (App. 11a) was entered on February 27, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

A. Introduction

In 1978, petitioner Snepp, a former employee of the Central Intelligence Agency, was enjoined by the United States District Court for the Eastern District of Virginia from publishing any writing containing information about the CIA or intelligence activities generally that he learned during the course of or as a result of his employment with the CIA, without first submitting the writing to the CIA for prepublication review. (App. 20a-21a.) Under prevailing case law in the Fourth Circuit, Snepp was entitled to judicial review of the CIA's censorship decisions made in the course of the required prepublication review, but the burden was on him to seek such review. *United States* v. *Marchetti*, 466 F.2d 1309, 1317 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). However, in its opinion sustaining the judgment against Snepp, this Court said that the CIA bears the burden of seeking an injunction when the Agency and a former employee disagree about what can be published. *Snepp* v. *United States*, 444 U.S. 507, 513 n.8 (1980). In the instant action, Snepp asked the district court to conform the underlying injunction against him to this Court's opinion by amending it to require the Agency and not Snepp to seek judicial relief in the case of a disagreement. The district court refused to grant the requested relief, and the court of appeals affirmed.

B. The Prior Litigation

Petitioner Snepp was employed by the CIA from 1968 to 1976 and spent most of his career working either in Vietnam or on matters related to Vietnam at CIA Headquarters. In 1977, he published a critical account of the final days of the United States' involvement in Vietnam entitled *Decent Interval* without submitting the manuscript to the Agency for prepublication review. The United States sued on the ground that publication with-

out the Agency's permission violated both the terms of a secrecy agreement Snepp had signed when he began his employment with the CIA and the position of trust that is inherent in employment by the CIA.[1] Although the government conceded for purposes of the litigation that Snepp's book contained no classified information, it alleged that the act of publication without first submitting the manuscript for prepublication review was a breach of Snepp's contractual and fiduciary duties that caused irreparable harm to the United States.

The district court agreed with the government and imposed a constructive trust in favor of the United States on all of the proceeds from the book. *United States* v. *Snepp*, 456 F. Supp. 176 (E.D. Va. 1978). In addition, the district court enjoined Snepp from any further breaches of his contractual and fiduciary duties by failing to submit his writings for prepublication review. At that time, the Fourth Circuit's *Marchetti* opinion was the leading case on prepublication review, and the injunction against Snepp was drafted in light of the *Marchetti* opinion.

In *Marchetti*, the court of appeals held that "[s]ome prior restraints in some circumstances are approvable of course," and that "the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment." 466 F.2d at 1316-17. Nonetheless, the court also held in *Marchetti* that CIA employees do not completely surrender their First Amendment rights when they accept employment with the Agency. *Id.* at

---

[1] The secrecy agreement provided in pertinent part that Snepp would "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency." *Snepp*, 444 U.S. at 508.

1317. First, the court noted that it would decline to enforce a secrecy agreement "to the extent that it purports to prevent disclosure of unclassified information." *Id.* Second, following this Court's opinion in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the court of appeals stated that, "[b]ecause we are dealing with a prior restraint upon speech, we think that the CIA must act promptly to approve or disapprove any material which may be submitted to it by Marchetti." *Id.* Thus, the court held that "the maximum period for responding after the submission of material for approval should not exceed thirty days." *Id.* Third, the court noted that "since First Amendment rights are involved, we think Marchetti would be entitled to judicial review of any action by the CIA disapproving publication of the material." *Id.* However, in a departure from *Freedman*, the court of appeals held that "[b]ecause of the sensitivity of the area and confidentiality of the relationship in which the information was obtained . . . we find no reason to impose the burden of obtaining judicial review upon the CIA. It ought to be on Marchetti." *Id.*

Consistent with the *Marchetti* opinion, the district court's injunction against Snepp (1) requires him to submit any of his writings that contain information about the CIA or intelligence activities generally that he learned as a result of his employment with the CIA; (2) requires the CIA to review the material within 30 days; and (3) says that, on review, "the only material for which approval for publication may be withheld by the Agency is that material which the Agency determines to be classified." (App. 20a-21a.) The injunction does not speak expressly to the question of judicial review, but the district court plainly intended that review would be available to Snepp at his initiative, at least on the question whether the Agency was seeking to prevent the publication of unclassified material.

On Snepp's appeal from the district court's 1978 judgment, the court of appeals affirmed the injunction but reversed the imposition of the constructive trust and remanded the case for further proceedings on whether the government was entitled to punitive damages. *United States* v. *Snepp*, 595 F.2d 926 (4th Cir. 1979). This Court reversed the court of appeals insofar as it refused to impose a constructive trust and remanded the case for reinstatement of the full judgment of the district court. *Snepp* v. *United States*, 444 U.S. 507 (1980). In response to the dissent's argument "that the Court is allowing the CIA to 'censor' its employees' publications," *id.* at 513 n.8, the Court made the following statements, which give rise to the present controversy:

> "Snepp's contract, however, requires no more than a clearance procedure subject to judicial review. If Snepp, in compliance with his contract, had submitted his manuscript for review and the Agency had found it to contain sensitive material, presumably—if one accepts Snepp's present assertion of good intentions—an effort would have been made to eliminate harmful disclosures. Absent agreement in this respect, the Agency would have borne the burden of seeking an injunction against publication. *See Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); *United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972)." *Id.*

C. The Present Controversy

Snepp has continued to pursue his post-CIA career as a writer within the constraints imposed by his contract as enforced by the injunction. From 1980 through 1988, he submitted 19 manuscripts to the CIA's Prepublication Review Board (PRB), 18 of which were reviewed without serious controversy. However, on November 22, 1985, Snepp submitted a manuscript entitled "Background: Lawcase Story," which led to the instant dispute. This manuscript was an initial outline, or "treatment," of a

possible television mini-series, based on Snepp's experiences in Vietnam. CBS, the interested network, expected to receive the treatment by January 1986.

On December 30, 1985, the PRB provided a "broad and generic" review in which it approved the manuscript subject to the following restrictions: (1) no overseas CIA location except Saigon could be named; (2) no real names of persons could be used except Snepp's own; and (3) the name of a specific company in the manuscript could not be included. On January 10, 1986, Snepp wrote to the PRB, and noted that it had failed to complete its review within the 30-day period mandated by the district court. Snepp further protested that (1) the PRB's proposed deletions were unduly vague and overly broad; (2) the PRB had cleared much of the information now subject to deletion in previous manuscripts submitted by Snepp; (3) some of the information was contained in other documents already in the public domain; and (4) deletion of the name of the company was unwarranted because Snepp had chosen the company name arbitrarily and not as a consequence of information obtained during the course of his employment with the Agency.

In a letter dated February 11, 1986, the PRB refined its position and identified eleven specific deletions. Following further unsuccessful negotiations and after retaining counsel, who were required to obtain the necessary security approvals, Snepp filed an appeal pursuant to CIA regulations on February 13, 1987. The Agency responded on March 27, 1987, reversing the PRB with respect to all but one deletion. However, Snepp's vindication came much too late, for CBS's deadline for receiving the manuscript had passed 14 months earlier and the television project had already fallen through.

D. The Current Litigation

On December 21, 1988, Snepp filed in the district court a petition seeking, among other things, an order clarify-

ing the district court's 1978 injunction to make clear that the CIA bears the burden of seeking judicial enforcement of its deletion decisions in the event of disagreement. In an oral ruling from the bench on January 27, 1989, the district court denied all relief sought by Snepp. (App. 13a-18a.) [2]

On appeal, Snepp pressed only his request for clarification of the injunction. He argued that footnote 8 in this Court's opinion in his case constituted a change in the law from the *Marchetti* holding that the author bears the burden of seeking judicial review and that this change warranted modification of the injunction to place that burden on the government.

Snepp also relied on the Department of Justice's regulation governing prepublication review for the employees of that Department who have access to "sensitive compartmented information," which is the most highly classified information the government possesses. Department of Justice Order 2620.8, "Employee Obligations to Protect Classified Information and Submit to Prepublication Review," (Aug. 25, 1983). This regulation provides that "authors who are dissatisfied with the final administrative decision may obtain judicial review either by filing an action for declaratory relief or by giving the Department notice and a reasonable opportunity (30 working days) to file a civil action seeking a court order prohibiting disclosure." *Id.* ¶ 5(k). The Justice Department order further provides that "until any civil action is resolved in court, employees remain under an obligation not to disclose or publish information determined by the Government to be classified." *Id.*

Snepp argued that the Justice Department regulation shows that (1) the Justice Department reads footnote 8

[2] The district court's jurisdiction in the government's original suit against Snepp, of which his 1988 petition was a continuation, was founded on 28 U.S.C. § 1345. If Snepp's petition were regarded as a new suit, jurisdiction would be founded on 28 U.S.C. § 1331.

in this Court's *Snepp* opinion to require the government to bear the burden of enforcing deletion decisions, and (2) the modification he seeks to his injunction is workable. He therefore urged that his injunction be amended along the lines of the Justice Department's regulation.[3]

The court of appeals rejected Snepp's contentions and affirmed the district court's judgment. The court identified four reasons for concluding that this Court did not intend footnote 8 in *Snepp* "to overrule" the *Marchetti* ruling that the author bears the burden of seeking judicial review. (App. 10a.) First, the court of appeals

---

[3] Snepp proposed that the following language be inserted at the end of paragraph 4 of the district court's injunction (App. 20a-21a):

> If the Agency fails to respond to Snepp within thirty days after receipt of such writing or if Snepp is dissatisfied with the Agency's response, Snepp may either seek judicial review or inform the Agency that he intends to publish his writing notwithstanding the Agency's failure or refusal to grant permission. Such notice shall include a statement of reasons why Snepp is dissatisfied with the Agency's position. If Snepp gives such notice, he shall not publish his writing until fifteen days after the Agency received the notice. If the United States elects to seek an order restraining publication by Snepp, or if Snepp elects to seek judicial review, he shall not disclose the disputed writing to any unauthorized person during the pendency of such litigation.

Snepp's proposed modification differs from the Justice Department's regulation in two respects. First, the period within which the government must go to court—during which Snepp cannot publish—is 15 calendar days instead of 30 working days from the date on which he notifies the CIA of his intention to publish. This adjustment would be more nearly consistent with this Court's emphasis in *Freedman* on the need for expedition in resolving disputes that restrain the exercise of First Amendment rights. Second, Snepp's proposal requires him to state the reasons he is dissatisfied with the CIA's deletions or failure to complete its review within thirty days when he gives notice that he intends to publish notwithstanding the absence of Agency approval. Such a statement of reasons would better enable the CIA and the Department of Justice to evaluate whether to initiate suit.

noted that the footnote cites *Marchetti* (*id.*), albeit with only a "*see*" citation and not to the particular page discussing the question of which party bears the burden of seeking judicial review. Second, the court noted that this Court had ruled that Snepp has a duty to obtain "clearance" from the CIA. (*Id.*). The court of appeals reasoned that "[t]he only substitute for CIA clearance would be a judicial declaration that clearance had been improperly withheld," and therefore it is Snepp's obligation to seek such a declaration, just as he must seek clearance. (*Id.*) Third, the court of appeals noted that this Court had found the secrecy agreement enforceable and had affirmed the injunction, "both of which indicate that CIA approval is a precondition to publication." (*Id.*) Fourth and finally, the court of appeals observed that one of the reasons this Court had imposed the constructive trust remedy was "to avoid forcing the CIA to sue in open court for punitive damages" and concluded that "[p]lacing the burden to seek an injunction on the author in such a context is consistent with the same policy." (*Id.*)

The court of appeals also offered what it characterized "as a plausible interpretation of footnote 8." (App. 10a.) Under this reading, the CIA "has an option to seek an injunction" if it desires to "enhanc[e] its ability to enforce the secrecy agreement with the contempt powers of the court." (App. 9a-10a.) However, this opportunity for the Agency to strengthen its hand, according to the court of appeals, "would not eliminate Snepp's burden to seek judicial review of the Agency's decision to withhold approval." (App. 9a.)

In a footnote, the court of appeals also noted what it perceived to be practical problems with Snepp's proposal, even though it tracked the Justice Department's regulation. The court feared that "[r]equiring the CIA to review the two to three hundred manuscripts submitted each year and to decide in a matter of days whether to

ask the Department of Justice to file suit for an injunction would increase the risk that the Agency might miss the significance of some information and allow a damaging revelation." (App. 7a-8a n.3.) This danger, the court predicted, could lead the CIA routinely to file suits as a protective measure, thus resulting in unnecessary costs for both the government and the authors. (*Id.*) In addition, the court of appeals found that Snepp's proposal was contrary to the CIA's "legitimate interest in avoiding litigation altogether." (*Id.*)

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question of First Amendment law in a way that squarely and irreconcilably conflicts with a prior decision of this Court in this very case. That prior decision, moreover, applied a principle established by earlier decisions of the Court: that a system of prior clearance of publications, in the rare circumstances where such a system is allowed, is constitutional only if the governmental body that seeks to restrain publication bears the burden of going to court to have the restraint enforced. The decision below is clearly in conflict with the decisions of this Court establishing that principle as well as with the decision that applied the principle to petitioner's case ten years ago.

The court of appeals' "plausible interpretation" of what this Court said in its previous decision in this petitioner's case is utterly implausible, and its reasons for not believing that this Court meant what it said are groundless. Furthermore, contrary to the court of appeals' assertions, the prior approval regime that petitioner proposed (and that this Court's previous decision contemplated) is workable and creates no unwarranted risk to the important interest in protecting classified information from unauthorized disclosure. The decision below if allowed to stand will affect not only petitioner but also the several hundred thousand former CIA and other government employees who have signed secrecy

agreements requiring prepublication review of their writings.[4]

I

When petitioner's case was here a decade ago, this Court said that if Snepp had submitted his *Decent Interval* manuscript for prepublication review, as required by his contract, and if he and the CIA had been unable to reach agreement on the elimination of harmful disclosures, "the Agency would have borne the burden of seeking an injunction against publication." *Snepp* v. *United States*, 444 U.S. at 513 n.8. This statement makes as clear as can be made that in cases of disagreement the burden of seeking judicial enforcement of a decision not to allow publication is on the government and that the author need not seek judicial review of such a decision, notwithstanding the Fourth Circuit's prior authority to the contrary.

Although footnote 8 in *Snepp* is not supported by any extended analysis, the statement that "the Agency would have borne the burden of seeking an injunction against publication" is in fact consistent with the Court's earlier opinion in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), a First Amendment prior restraint decision. In *Freedman*, the Court considered the constitutionality of a state statute that required submission of motion pictures to a board of censors before any picture could be exhibited. In *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43 (1961), the Court had rejected the proposition that the requirement of submitting films for approval prior to showing was an unconstitutional prior restraint in all

[4] The General Accounting Office determined that, as of the end of 1987, some 500,000 employees in agencies other than the CIA and the National Security Agency had signed secrecy agreements calling for prepublication review. All CIA and NSA employees sign such agreements, but their numbers are classified. *Congress and the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 171-72 (1988).

circumstances. *Freedman*, 380 U.S. at 53-54. Without reconsidering the *Times Film* holding, the Court in *Freedman* considered the constitutional adequacy of the procedures prescribed by the Maryland statute that required pre-exhibition review of films.

Because "[t]he administration of a censorship system . . . presents peculiar dangers to constitutionally protected speech," 380 U.S. at 57, the Court held in *Freedman* that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. Among the safeguards prescribed by the Court, the censor must "within a specified brief period, either issue a license or go to court to restrain showing the film." *Id.* at 59. In *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), the Court "reaffirm[ed] . . . that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards," one of which is that "the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest with the censor." *Id.* at 560.

It is thus clear from *Freedman* and *Southeastern Promotions* why this Court said in *Snepp* that "the Agency [bears] the burden of seeking an injunction against publication" if Snepp and the Agency are unable to agree on eliminating material identified as classified. 444 U.S. at 513 n.8. It is also clear that the *Marchetti* opinion was mistaken in placing the burden of seeking judicial review on the author, and the court below was equally mistaken in adhering to *Marchetti*.[5]

---

[5] In *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596 (1990), a plurality of the Court held that a city ordinance requiring sexually oriented businesses to obtain a license certifying that the premises were in compliance with applicable health, fire and building codes was not invalid for lack of a provision that the city bear the burden of seeking judicial review. Although requiring other protections prescribed by *Freedman*, the plurality was willing to dispense with

II

The court of appeals' four reasons for concluding that this Court did not intend "to overrule" *Marchetti*'s holding that the author bears the burden of seeking judicial review are unpersuasive. In the first place, this Court does not "overrule" lower court opinions; it reviews judgments and states the law. When this Court makes an authoritative ruling on a question of law, contrary precedents of the courts of appeals are no longer authoritative, whether or not the Court says explicitly that they are disapproved. And, if one sentence in a footnote is all that it takes for this Court to make an authoritative ruling, the ruling does not lack authoritativeness for being so stated.

---

this requirement because the licensing scheme at issue there "does not present the grave 'dangers of a censorship system'" and is "significantly different from the censorship scheme examined in *Freedman*." 110 S. Ct. at 606 (quoting *Freedman*, 380 U.S. at 58). While in *Freedman*, "the censor engaged in direct censorship of particular expressive material," the City of Dallas "does not exercise discretion by passing judgment on the content of any protected speech" but rather "reviews the general qualifications of each license applicant." 110 S. Ct. at 606-07. Furthermore, whereas in *Freedman* "the motion picture distributor was likely to be deterred from challenging the decision to suppress" one film, the license required by the Dallas ordinance "is the key to the applicant's obtaining and maintaining a business [and] there is every incentive for the applicant to pursue a license denial through court." *Id.* at 607. "[B]ecause of these differences" the plurality concluded "that the First Amendment does not require the city bear the burden of going to court to effect the denial of the license application or that it bear the burden of proof once in court." *Id.*

The plurality opinion in *City of Dallas* in no way erodes Snepp's reliance on *Freedman*. First, the CIA's prepublication review process is without doubt a classic system of prior restraint, albeit a legitimate one. Second, the review process deletes "particular expressive material." *Id.* at 607. Third, the individual author is quite likely—indeed more likely than the motion picture distributor in *Freedman*—to be deterred from seeking judicial review by the expense involved.

In support of its position, the court of appeals first observed that footnote 8 in *Snepp* contains a "*see*" citation to *Marchetti*. (App. 10a.) But that citation is to the opinion as a whole and not to the particular page that placed the burden of seeking judicial review on the author. The *Marchetti* opinion on the whole is instructive on the general matter of the constitutionality of secrecy agreements and therefore was an appropriate response to the dissent's argument that the majority was allowing the CIA "to censor" its employees. Moreover, this Court cannot be presumed, as the court of appeals presumed it did, to have cited *Marchetti* to contradict the immediately preceding statement that the CIA bears the burden of going to court in the event of disagreement with the author.

The court of appeals' second point was that Snepp has "an obligation to obtain 'clearance' from the CIA prior to publication" and "[t]he only substitute for CIA clearance would be a judicial declaration that clearance had been improperly withheld." (App. 10a.) But *Freedman* holds that Snepp cannot be required to seek such a judicial declaration. In any system of prior restraint or prior approval, the regulated party is required to obtain clearance or approval, but under *Freedman* the denial of clearance or approval can be enforced, ultimately, only by a court acting on the censor's application.

The court of appeals' third point that this Court's affirmance of the injunction and enforcement of Snepp's secrecy agreement "indicate that CIA approval is a precondition to publication" (App. 10a) begs the question of which party must go to court. The court of appeals' fourth point that this Court imposed the constructive trust remedy in part to avoid forcing the CIA to sue in open court for punitive damages and therefore that "[p]lacing the burden to seek an injunction on the author in such a context is consistent with the same policy" (*id.*) is an unfounded leap of logic. To be sure, this Court spared the CIA the burden of proving all that

would be necessary to make out a case for punitive damages, but proving punitive damages is a far cry from determining whether approval for publication has been properly or improperly withheld. This Court said in footnote 8 of *Snepp* that the clearance procedure is "subject to judicial review." Whatever exposure to open court proceedings that review entails will not be affected by which party bears the burden of initiating review.

Finally, the court of appeals' "plausible interpretation" of footnote 8 in *Snepp*—that this Court was talking about an optional judicial remedy available to the CIA to enable it to enhance its ability to enforce the secrecy agreement but was not eliminating Snepp's burden to seek judicial review (App. 9a-10a)—is a tortured and completely implausible reading of the footnote. There is no indication in footnote 8 or any other reason to think that the Court was suggesting that there might be two judicial proceedings arising out of a dispute between the CIA and an author or that the CIA's "burden of seeking an injunction" was a mere option for the Agency. The footnote addressed "judicial review" to which the "clearance procedure [is] subject," and the footnote plainly said that in the event of disagreement "the Agency would have borne the burden of seeking an injunction against publication." [6]

III

The court of appeals never came to grips with Snepp's argument that the proposed modification to his injunction was modeled on a Department of Justice regulation

[6] Closer to plausibility is an interpretation that footnote 8 addressed only what "would have been" the situation had Snepp complied with his agreement rather than speaking to whether an injunction entered after he had violated the agrement might place upon him a burden he would not otherwise have borne. But that interpretation is inconsistent with the Court's description of the injunction as merely "enjoin[ing] future breaches of Snepp's agreement." 444 U.S. at 509. And footnote 8, so interpreted, would not have been any answer to the dissent's accusation that the Court's decision in *Snepp* was "allowing the CIA to 'censor' its employees' publications."

governing employees who have access to information that is just as sensitive as that to which CIA employees have access. For example, the FBI is governed by the Justice Department regulation, and the writings of former FBI agents who have engaged in foreign counterintelligence work and conducted liaison activities with foreign security services, as many FBI agents do, present no less serious concerns than the writings of former CIA employees. Yet the Department of Justice regulation does not impose on former FBI agents the burden of seeking judicial review.

The court of appeals suggested in a footnote that Snepp's proposal—and presumably the Justice Department's regulation—present unacceptable burdens and risks for the CIA. (App. 7a-8a n.3.) That concern is unfounded. The court of appeals believed that Snepp's proposed modification of his injunction would jeopardize the CIA's interest in preserving the confidentiality of its information because the modification would require the CIA "to review the two to three hundred manuscripts submitted each year and to decide in a matter of days whether to ask the Department of Justice to file suit." (App. 8a n.3.) The court further believed that this supposed constraint "would increase the risk that the Agency might miss the significance of some information and allow a damaging revelation." (*Id.*) On this supposition, the court reasoned that the CIA might "decide, as a protective measure, to file suit for an injunction on a routine basis," and that this practice would result in "unnecessary costs for both the government and the authors who would have to defend themselves." (*Id.*)

This entire line of reasoning is based on a misreading of Snepp's position. Under Snepp's proposed amendment to his injunction, he would be required, as the injunction now provides, to submit to the CIA any writing "containing information which relates to the [Agency], its activities, intelligence activities generally or intelligence sources

and methods, which information [he] gained during the course of or as a result of his employment with the [CIA]." (App. 20a.) The CIA would have the same amount of time that it has under the current regime to review Snepp's writings and decide whether they contain information that must be deleted. The task of deciding whether to file suit would arise only if, after the review time expired, Snepp gave notice that he was dissatisfied with the result and intended to publish. At that point, he would not be free to publish but would be required to wait a fixed period of time (15 calendar days under Snepp's proposal, 30 working days under the Justice Department's regulation) to allow the Agency to confer with the Justice Department. And the filing of suit by the government would automatically, by the terms of the injunction, restrain Snepp from publishing for as long as the suit was pending.

Moreover, the number of former CIA employees who have filed suit challenging the CIA's censorship decisions is exceedingly small. In addition to the instant case, there are only two other reported cases, *McGehee* v. *Casey*, 718 F.2d 1137 (D.C. Cir. 1983); *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975), and we are unaware of any unreported cases. Thus, even if it is assumed that some dissatisfied authors have been deterred from challenging the CIA's decisions by the present allocation of the burden of seeking judicial review, there is no reason to fear that Snepp's proposal would lead to an unmanageable volume of litigation.

The court of appeals also noted that the CIA "has a legitimate interest in avoiding litigation altogether." (App. 8a n.3.) Be that as it may, this Court has already held in footnote 8 of *Snepp* that the CIA's prepublication review procedure is subject to judicial review, and therefore the Agency is already exposed to the potential of litigation. Accordingly, the CIA's interest in avoiding all

litigation—an interest shared by all defendants—does not justify distortion of the First Amendment procedural protections established by cases such as *Freedman* and *Southeastern Promotions*. *Cf. Webster* v. *Doe*, 486 U.S. 592, 604 (1988) (because the CIA is already subject to statutory claims, burdens of litigation do not warrant preclusion of constitutional claims).

Moreover, it is important to recognize that the modification Snepp seeks would not change the standard of judicial review, which is, as the court of appeals correctly noted, narrow and highly deferential to the government. (App. 5a-6a n.2.) *See McGehee*, 718 F.2d at 1148; *Alfred A. Knopf*, 509 F.2d at 1367-70. Since Snepp is not seeking any adjustment in the standard of review but only in the allocation of the burden of seeking such review, the modification will not jeopardize the government's interests in secrecy to any greater extent than does the present regime.

Had this amendment been in effect when the instant controversy arose, it would effectively have telescoped the process that led to petitioner's ultimate but belated vindication on all but one of the deletions from his television outline. After the CIA failed to respond within thirty days or upon his receipt of the unsatisfactory "broad and generic" guidance in December 1985, Snepp under the proposed amendment could simply have notified the PRB that he intended to proceed with publication unless the government went to court. Had he waited for the Agency's overdue written response, Snepp's notice would have included the reasons why he disagreed with the CIA's determinations. In either case, he could not publish until the expiration of the time prescribed for the government to decide whether to litigate. Faced with the imminent prospect of having to defend its position in court, the CIA quite probably would have reached the same conclusion it reached on Snepp's administrative appeal—that the manuscript contained not eleven but only

one reference to classified information. The significant difference, however, is that the Agency would have been brought to this conclusion much sooner than it was under the present regime.[7]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. ALLEN
MARK H. LYNCH *
STEVEN F. REICH
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Petitioner

* Counsel of Record

May 29, 1990

[7] When the PRB's legal adviser transmitted Snepp's appeal to the Inspector General, she noted that "the Office of General Counsel would like to consult with the Inspector to provide its views on the litigation potential of this case." (Court of Appeals Joint Appendix 106) It appears that consideration of the "litigation potential" of the PRB's initial deletions had a beneficial effect in the determination of Snepp's appeal, and the proposed amendment would force these considerations sooner.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2951

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

FRANK W. SNEPP, III,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
James C. Cacheris, District Judge. (CA-78-92-A)

Argued: January 10, 1990 Decided: February 27, 1990

Before PHILLIPS and MURNAGHAN, Circuit Judges, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

ARGUED: Mark H. Lynch, COVINGTON & BURLING, Washington, D.C., for Appellant. Deborah Ruth Kant, Civil Division, UNITED STATES DEPARTMENT OF

JUSTICE, Washington, D.C., for Appellee. ON BRIEF: William H. Allen, Steven F. Reich, COVINGTON & BURLING, Washington, D.C., for Appellant. Stuart E. Schiffer, Acting Assistant Attorney General, Barbara L. Herwig, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Henry E. Hudson, United States Attorney, Alexandria, Virginia, for Appellee.

MURNAGHAN, Circuit Judge:

I.

Frank Snepp III appeals from the district court's denial of his petition to modify a permanent injunction requiring him to submit all writings concerning the Central Intelligence Agency (CIA) for review prior to publication. Snepp served as an agent for the CIA from 1968 to 1976 and spent most of his time either in Vietnam or working on matters related to Vietnam. After resigning from the Agency, he published a book in 1977 about the United States' involvement in Vietnam, entitled *Decent Interval*, in violation of an employment agreement to submit all writings to the CIA for review prior to publication.[1] The government brought an action to enforce the contract, seeking a permanent injunction against future breaches of the contract and a constructive trust over the net profits from the book. Snepp argued that the agreement was unenforceable as an impermissible restriction on his First Amendment right to free speech.

---

[1] As a condition of his employment with the CIA in 1968, Snepp signed an agreement promising that he would "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific approval by the Agency." *Snepp v. United States*, 444 U.S. 507, 508 (1980). He signed a similar secrecy agreement upon leaving the CIA in 1976.

The district court found that the agreement was enforceable and that Snepp had violated the agreement by publishing the book without submitting it for review prior to publication. *United States v. Snepp*, 456 F. Supp. 176 (E.D. Va. 1978). The district court imposed a constructive trust over profits from the book and ordered that Snepp be permanently enjoined

> from further breaching the terms and conditions of the defendant's Secrecy Agreement and fiduciary duty with the Central Intelligence Agency by failing to submit any manuscript or other writing containing information which relates to the Central Intelligence Agency, . . . which information the defendant gained during the course of or as a result of his employment with the Central Intelligence Agency, for Agency review prior to publication; *Provided*, however, that Agency review shall be made within thirty (30) days after receipt of such writing, and *Provided*, further, that the only material for which approval for publication may be withheld by the Agency is that material which the Agency determines to be classified.

Snepp appealed, pressing his argument that the prepublication review procedure constituted a prior restraint in violation of his First Amendment right to free speech and that the government interest at stake did not justify the drastic remedy of a constructive trust. We affirmed the injunction, but reversed the imposition of a constructive trust. *Snepp v. United States*, 595 F.2d 926 (4th Cir. 1979). Citing the compelling national security interests at stake and the CIA's statutory duty to protect sensitive information against public disclosure, the Supreme Court found the secrecy agreement reasonable and affirmed the injunction. *Snepp v. United States*, 444 U.S. 507 (1980).

The Court also reinstated the constructive trust as the only effective deterrent to breach of the agreement.

The government's only alternative remedy, a suit for punitive damages, "would subject the CIA and its officials to probing discovery into the Agency's highly confidential affairs." 444 U.S. at 514-15. By forcing revelation of confidential information, even to a limited audience, the CIA would lose "the benefit of the bargain it seeks to enforce." *Id.*

Since the Supreme Court decision, Snepp has submitted 19 manuscripts to the CIA's Prepublication Review Board (PRB) for approval prior to publication. The parties have been able to reach a satisfactory agreement over the publication of 18 of those manuscripts. Disagreement over the last, however, has led to the litigation before us.

On November 22, 1985, Snepp submitted to the PRB a manuscript for a potential television mini-series entitled "Background: Lawcase Story" about Snepp's experiences in Vietnam. The PRB telephoned Snepp on December 20, 1985, to ask whether the manuscript would be published as fact or fiction. Snepp indicated that he did not know the answer at that point. On December 30, 1985, he received a letter from the PRB with a "broad and general" review prohibiting Snepp's use of any overseas CIA location (except Saigon), any real names (except his own), and the use of the name of a specific company. Snepp responded with a letter in January protesting that the review was late, the conditions were vague, and the restrictions were unwarranted because the PRB had cleared similar material in the past.

In February, the PRB produced a list of 11 specific deletions as a condition to publication. Negotiations continued, and Snepp appealed the decision within the Agency. On March 27, 1987, the CIA finally reversed the PRB with respect to all but one deletion. Because of the delay, however, Snepp's television deal had already fallen through.

Snepp filed a petition in the district court below seeking (1) an order to show cause why the government should not be held in contempt for violating the injunction, (2) damages for the lost television deal, (3) an order disapproving the one remaining deletion required by the PRB, and (4) a clarification or modification of the permanent injunction to place the burden on the CIA to initiate judicial proceedings if he and the CIA could not agree over what material should be deleted from a particular manuscript. The district judge found that the CIA had acted reasonably and that Snepp had not shown a sufficient need to modify the injunction. Consequently, the district court denied all relief sought by Snepp.

II.

On appeal, Snepp contests only the district court's refusal to amend the permanent injunction. A modification may be granted where warranted by a change in the law or the circumstances. *United States v. Swift & Co.*, 286 U.S. 106 (1932); *Nelson v. Collins*, 700 F.2d 145, 147 (4th Cir. 1983). A court is, nevertheless, "not at liberty to reverse under the guise of readjusting." *Swift*, 286 U.S. at 119. We review the district court's decision not to modify the injunction under an abuse of discretion standard. *Brennan v. Thor*, 516 F.2d 999 (4th Cir. 1975).

The present injunction makes CIA approval a precondition to Snepp's publication of any writing relating to the CIA. The CIA may, however, withhold that approval only for classified information that has not already been disclosed to the public. If Snepp disagrees with the Agency over the propriety of its decision to withhold approval and he cannot negotiate a satisfactory resolution, he must either accede to the Agency's conditions or initiate a judicial action.[2] The question confronting

[2] While the author is entitled to judicial review, the scope of that review is narrow. Courts must avoid second-guessing the

us thus becomes one of where the burden lies of initiating the attempt to secure judicial review.

Snepp argues that the CIA's interest in protecting confidential information may justify prepublication review, but that interest does not justify placing the burden on him to seek judicial resolution of disputes that arise. For support, Snepp cites *Freedman v. Maryland*, 380 U.S. 51 (1965), in which the Court struck down a state statute requiring submission of motion pictures to a board of censors before any movie could be exhibited. The Court found, in part, that any review system must put the burden on the government to seek an injunction. 380 U.S. at 59.

Snepp proposes an alternative modeled on the Department of Justice Guidelines. Under his proposal, the author could announce an intent to publish notwithstanding disapproval by the Agency. The CIA would then have 15 days in which to decide whether to file an action seeking an injunction against publication. Snepp argues that the existing Department of Justice scheme proves that placing the burden on the Agency is feasible and would not compromise security interests.

Snepp's argument encounters several difficulties. First, nothing he cites is a change in the law or the circumstances which existed at the time his injunction was affirmed by the Supreme Court. He is essentially argu-

---

CIA's decision to classify information because they have only a limited knowledge of foreign intelligence matters. "What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). *Cf. CIA v. Sims*, 471 U.S. 159, 178 (1985) (quoting this language with approval in the context of a Freedom of Information Act request). As a result, "[t]he issues upon judicial review would seem to be simply whether or not the information was classified and, if so, whether or not, by prior disclosure, it had come into the public domain." 466 F.2d at 1318.

ing that the original decision in his case should have placed the burden on the CIA to seek judicial review. Reasserting the merits of his case does not, however, justify altering an injunction.

Second, the issue has been squarely addressed in this circuit in *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). In *Marchetti*, the defendant was also a former CIA employee who had published a novel and an article in violation of a secrecy agreement similar to Snepp's. In evaluating the government interest at stake, we noted that:

> [c]itizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with national interest.

466 F.2d at 1315. The court found the secrecy agreement a reasonable means to protect confidential information from disclosure. The court went on to say that

> since First Amendment rights are involved, we think Marchetti would be entitled to judicial review of any action by the CIA disapproving publication of the material. Some such review would seem essential to the enforcement of the prior restraint imposed upon Marchetti and other former employees. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 12 L.Ed.2d 649. Because of the sensitivity of the area and confidentiality of the relationship in which the information was obtained, however, we find no reason to impose the burden of obtaining judicial review upon the CIA. It ought to be on Marchetti.

466 F.2d at 1317.[3] The court noted the *Freedman* de-

[3] Even if the government has a tendency to "classif[y] as confidential much relatively innocuous or noncritical information,"

cision, but distinguished it, finding that the national security interests at stake required a different result.[4] These unique national security concerns also dispose of Snepp's attempt to equate his situation with that of a former employee of the Department of Justice.

Snepp argues that the Supreme Court decision affirming the injunction in his prior case, *Snepp v. United*

Halperin v. Kissinger, 606 F.2d 1192, 1204 n.77 (D.C. Cir. 1979), *aff'd by an equally divided court*, 452 U.S. 713 (1981), the government interests at stake justify placing the burden on the author to seek judicial review. The CIA has a compelling interest in preventing the disclosure or even the fear of disclosure of confidential information. Requiring the CIA to review the two to three hundred manuscripts submitted each year and to decide in a matter of days whether to ask the Department of Justice to file suit for an injunction would increase the risk that the Agency might miss the significance of some information and allow a damaging revelation. The Agency could, as a consequence, decide, as a protective measure, to file suit for an injunction on a routine basis. The result would be unnecessary costs for both the government and the authors who have to defend themselves.

The CIA also has a legitimate interest in avoiding litigation altogether. In a related context, we have "expressed our concern about the disclosure of sensitive information to lawyers, judges, court reporters, expert witnesses and others." *Colby v. Halperin*, 656 F.2d 70, 72 (4th Cir. 1981). *See also Snepp*, 444 U.S. 507; *Knopf v. Colby*, 509 F.2d 1362 (4th Cir. 1975). In adjudicating potentially confidential information, courts cannot provide the level of security that the CIA reasonably requires for highly sensitive information. Moreover, the Director of the CIA, Admiral Turner, testified in Snepp's original case that foreign intelligence services and sources would not deal with the CIA unless assured that any infomation exchanged would remain secret. *Snepp*, 444 U.S. at 512. Requiring the Agency to institute numerous judicial actions to prevent disclosure could create the impression among foreign intelligence services that the Agency cannot ensure the non-disclosure of shared confidential information.

[4] Even the dissent in *Snepp* agreed that the "right to delay publication until the review is completed is itself a form of prior restraint that would not be tolerated in other contexts." *Snepp*, 444 U.S. at 526, n.17 (Stevens, J., dissenting).

States, 444 U.S. 507 (1980), overruled *Marchetti* and placed the burden of seeking review on the CIA instead of the author. His argument rests on footnote 8 which states in part:

> The dissent argues that the Court is allowing the CIA to 'censor' its employees' publications. . . . Snepp's contract, however, requires no more than a clearance procedure subject to judicial review. If Snepp, in compliance with his contract, had submitted his manuscript for review and the Agency had found it to contain sensitive material, presumably—if one accepts Snepp's present assertion of good intentions—an effort would have been made to eliminate harmful disclosures. Absent agreement in this respect, the Agency would have borne the burden of seeking an injunction against publication. *See Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (CA4), cert. denied, 421 U.S. 992 (1975); *United States v. Marchetti*, 466 F.2d 1309 (CA4), cert. denied, 409 U.S. 1063 (1972).

Snepp, 444 U.S. 507, 513, n.8 (1980).

While the language in the footnote arguably imposes on the CIA the burden of seeking an *injunction* by initiating a legal proceeding, such a requirement would not eliminate Snepp's burden to seek judicial review of the Agency's decision to withhold approval. "In compliance with his contract," Snepp must submit his manuscript to the Agency for clearance prior to publication. If the Agency denies approval, Snepp may not publish the manuscript. If Snepp wishes to publish a manuscript in spite of the Agency's denial of approval without violating his secrecy agreement, then he must institute an action for judicial review of the Agency decision. Whether or not Snepp seeks judicial review of the Agency decision, the CIA still has an option to seek an injunction against his publication of a disputed manuscript, thus enhancing its

ability to enforce the secrecy agreement with the contempt powers of the court.[5]

While we offer the above analysis as a plausible interpretation of footnote 8, we need only decide if the Supreme Court intended to overrule *Marchetti*. A number of considerations suggest that the Court did not so intend. The Court cites *Marchetti*, with apparent approval, as support for the very statement Snepp uses to make his argument. Moreover, in the text of the decision, the Court emphasizes Snepp's "explicit obligation to submit his material—classified or not—for prepublication *clearance*. . . ." *Snepp*, 444 U.S. at 513 (emphasis added). The language strongly suggests that the Court viewed Snepp's duty as an obligation to obtain "clearance" from the CIA prior to publication. The only substitute for CIA clearance would be a judicial declaration that clearance had been improperly withheld. We also note that the Court in *Snepp* found the secrecy agreement enforceable and affirmed the injunction, both of which indicate that CIA approval is a precondition to publication. As a final consideration, the Court imposed the relatively drastic remedy of a constructive trust in part to avoid forcing the CIA to sue in open court for punitive damages. Placing the burden to seek an injunction on the author in such a context is consistent with the same policy.

For those reasons, we are not persuaded that the Supreme Court intended to overrule *Marchetti*. We are thus bound by the decision and find that the district court did not abuse its discretion in declining to modify the injunction.

AFFIRMED.

---

[5] Presumably the present injunction serves such a purpose. The disputed footnote, however, refers to CIA options absent such an injunction.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

February 27, 1990

* * * *

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s): 89-2951

* * * *

JOHN M. GREACEN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 78-0092-A

UNITED STATES OF AMERICA,
Plaintiff,

v.

FRANK W. SNEPP, III,
Defendant.

ORDER

For reasons stated in open court, it is accordingly ORDERED:

(1) that the defendant's Petition for an Order to Show Cause Why the United States of America Should Not Be Held in Contempt and Motion for Clarification of Permanent Injunction are DENIED;

(2) that the Clerk shall forward copies of this Order to all counsel of record.

/s/ James C. Cacheris
United States District Judge

January 27, 1989
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

C.A. No. 78-92-A

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK W. SNEPP, III,
Defendant.

The above-entitled matter came on to be heard in the United States District Court, Alexandria, Virginia, commencing at 10 a.m. on January 27, 1989.

Before: The Honorable James C. Cacheris, Presiding United States District Judge

For the United States:

Dennis E. Szybala, AUSA
Richard C. Stearns, Esq.

For the Defendant:

Michaela M. Twomey, Attorney
Debra L. Lagapa, Attorney

* * * *

THE COURT: This case has had a rather torrid history in this court. But in any event, it's on the defendant's petition for an order to show cause why the U.S. should not be held in contempt and a motion for clarification of permanent injunction.

It arises out of an earlier proceeding. Judge Lewis heard the case in 1978. He found that Mr. Snepp, the defendant, a former employee of the CIA, breached his employment contract with the CIA by publishing a manuscript containing information or material relating to the CIA without specific prior approval by the Agency.

Judge Lewis ordered that the defendant, Mr. Snepp, be permanently enjoined from any further violation of the security agreement contained in his employment contract by requiring him to submit to the CIA prepublication review any manuscript which he authors concerning the CIA. It was further ordered that the Agency review be made within 30 days after receipt of any manuscript by the defendant. The opinion is written at 456 F.Supp. 176. We have alluded to the fact it went to the Fourth Circuit, and further on to the Supreme Court.

In the instant case, Mr. Snepp contends that the CIA has not complied with the permanent injunction in that the Agency's review of his manuscript, "Lawcase", took more than 30 days to complete. The defendant petitions the Court for an order to show cause, a motion for clarification of Judge Lewis' permanent injunction, compensatory damages in the amount of $22,500 for the loss of a contract for the publication and production of his manuscript as a television mini-series and a court order reversing the Agency's decision to require the deletion of a company name appearing on page 28 of his "Lawcase" manuscript.

Mr. Snepp has claimed that the Agency has unlawfully failed to complete its review of his manuscript within 30 days as required by the order, which is a permanent injunction, and that his constitutional rights then to free expression and due process have been violated.

He further contends the Agency's violation of the Court's order amounts to contempt on the court. In addition, he requests a clarification of the Court's order and an order reversing the Agency's decision that a deletion on page [28] of the manuscript is justified under the secrecy agreement or the Court's order.

The U.S. in opposition says the CIA's review of the "Lawcase" manuscript was not in contempt of court as the injunction did not unambiguously command the CIA to complete its prepublication review within 30 days of receipt. Plaintiff contends that while the language of the order leaves some room for interpretation, it is obviously intended to provide that the Agency shall make a substantive response to Mr. Snepp within 30 days of receipt of any manuscript. The U.S. maintains that nothing within the order suggests that all Agency reviews shall be complete within 30 days.

The U.S. further contends that it received plaintiff's manuscript on November 25, '85; the CIA board of review met on December 10 '85 to review the manuscript; that on December 20, by telephone, the CIA advised Mr. Snepp that certain information, including names of CIA agents, locations of CIA duty stations and identification of an intelligence source, would have to be deleted.

Additional telephone conversations were had on December 23 and 30, '85, with Snepp in which the proposed deletions from the manuscript were discussed with Mr. Snepp, as well as an effort to determine whether Mr. Snepp's classification of his manuscript was fiction or non-fiction.

On December 30, '85, by letter, the Agency communicated its generic suggestions to Mr. Snepp. The United States asserts that the December 20 telephone conversation was a substantive response within 30 days of receipt of Mr. Snepp's manuscript, and the December 30, '85 letter confirmed what the Agency deemed as necessary deletions in order for the manuscript to be shown to the TV producers Mr. Snepp was scheduled to meet with in January.

Due to Mr. Snepp's objection to the Agency's decision regarding deletions, a second review of the manuscript was made and specific line-by-line deletions were communicated to Mr. Snepp by letter of February 11, '86.

This Court's order of August 2, 1978, states in pertinent part, subparagraph 4, Judge Lewis' order: "It is further ordered that the defendant Frank W. Snepp, III, is permanently enjoined from further breaching the terms and conditions of the defendant's Secrecy Agreement and fiduciary duty with the Central Intelligence Agency by failing to submit any manuscript or other writing containing information which relates to the Central Intelligence Agency, its activities, intelligence activities generally or intelligence sources and methods, which information the defendant gained during the course of, or as a result of, his employment with the CIA, for Agency review prior to publication; provided, however, that Agency review shall be made within 30 days after receipt of such writing, and provided, further, that the only material for which approval for publication may be withheld by the Agency is that material which the Agency determines to be classified.

The Court notes this comes before the Court as a motion for rule to show cause. Obviously, if I issue the rule, we'll have the contempt hearing another day.

In order to hold a party in contempt, the Court must be able to point to a decree from the court which sets forth [in] specific detail an unequivocal command which the party in contempt violated. In addition, the Court must look to the decree to determine whether the decree is unambiguous. *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. '86).

The order must be so specific and definite as to leave no reasonable basis for doubt as to its meaning. 17 Am. Jur. 2d, Contempt, Section 52.

Mr. Snepp must establish the plaintiff's contempt by clear and convincing evidence. *U.S. v. Rizzo*, 539 F.2d

458, 465 (5th Cir. 1976). It must clearly and convincingly be established that the plaintiff has failed in meaningful respects to achieve substantial and diligent compliance. *Aspira of N.Y. v. Bd. of Ed. of City of New York*, 423 F.Supp. 647 (S.D.N.Y. 1976).

The Court finds that the meaning of the passage of the injunction order: "Provided, however, that the Agency review shall be made within 30 days after receipt of such writing," the August 2, 1978 order of this court[,] is open to reasonable interpretation. The Court feels that the Agency has made substantial and dilligent efforts in attempting to comply as illustrated by the declaration of Eileen Roach Smith, Chairman of the Publications Review Board of the Central Intelligence Agency, which is found at Exhibit B to plaintiff's memorandum in opposition.

The Court would also note they have been submitted on 19 other occasions, and apparently has been no problem under this ruling. So, I'm going to deny the request for a rule to show cause at this time.

Obviously now the compensatory damages are moot in light of the Court's ruling. I think the page 28 decision [is] covered by the Marchetti case, not going to have any further hearing on that. The only question is whether I should change this order or not and to make any further clarification of it.

In *U.S. v. Swift and Company*, 286 U.S. 106, 114, the Supreme Court pointed out that a continuing decree of injunction directed to events to come is subject to adaptation as events may shape the needs. However, the Court went on to state that: "No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions should lead us to change this decree." That's at page 119.

The harshness of the Swift standard was relaxed some in *U.S. v. United Shoe Machinery Corporation*, 391 U.S.

244, a 1968 case, in which the court stated: "Swift teaches that a decree may be changed upon an appropriate showing and it holds that it may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree have not been fully achieved."

The defendant requests clarification of the order contending that the Court's attempt to balance the Agency's censorship against Mr. Snepp's First Amendment Rights have proven to be insufficient.

The plaintiff insists that no good cause exists for modification of the court's original order.

The Court finds that there has been 20 manuscripts submitted to the C.I.A., 19 there's no problem with; the 20th, apparently has been a problem. When I say "no problem", obviously the other 19 they worked out their arrangements on.

The defendant is submitting his manuscripts regarding the CIA to the Agency for prepublication review, and the Agency has complied with the 30-day review requirements. The Court finds no appropriate showing by the defendant in Snepp requiring modification or clarification. I will note this order has been effective since [1978]. I will deny that motion.

As to page 28, I think the Marchetti case covers that. I feel his motion should be denied as to page 28 manuscript. I will enter an appropriate order.

Thank you.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 78-92-A

UNITED STATES OF AMERICA,
Plaintiff,

v.

FRANK W. SNEPP III,
Defendant.

ORDER

[Filed Aug. 2, 1978]

In accordance with the Memorandum Opinion and Order entered by this Court on July 7, 1978, it is hereby ORDERED, ADJUDGED and DECREED:

(1) that a constructive trust for the benefit of the United States is hereby imposed over any and all revenues, gains, profits, royalties and other financial advantages derived by the defendant, Frank W. Snepp III, from the sale, serialization, republication rights in any form, movie rights and other distribution for profit of the work entitled *Decent Interval* in the possession or control of the defendant, his assigns, agents servants, employees, and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order through personal service or otherwise.

(2) that the defendant, Frank W. Snepp III, file with this Court on or before August 28, 1978 an accounting of any and all revenues, gains, profits, royalties and other financial advantages derived by the defendant from the sale, serialization, republication rights in any form,

movie rights or other distribution for profit of the work entitled *Decent Interval* which have heretofore been paid to the defendant, his assigns, agents, servants, employees and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order through personal service or otherwise, together with his check payable to the Treasurer of the United States, for the monies thus accounted for.

(3) that the said Frank W. Snepp III is further directed to forthwith pay to the Treasurer of the United States any and all revenues, gains, profits, royalties and other financial advantages derived by him after his first accounting from the sale, serialization, republication rights in any form, movie rights or other distribution for profit of the work entitled *Decent Interval*, said monies to be paid by check or money order payable to the Treasurer of the United States and forwarded to the United States Department of Justice, and

(4) it is further ORDERED, ADJUDGED and DECREED that the defendant, Frank W. Snepp III, his assigns, agents, servants, employees and attorneys, and those persons in active concert or participation with him who receive actual notice of this Order through personal service or otherwise, and each of them, be and they hereby are permanently enjoined from further breaching the terms and conditions of the defendant's Secrecy Agreement and fiduciary duty with the Central Intelligence Agency by failing to submit any manuscript or other writing containing information which relates to the Central Intelligence Agency, its activities, intelligence activities generally or intelligence sources and methods, which information the defendant gained during the course of or as a result of his employment with the Central Intelligence Agency, for Agency review prior to publication; *Provided*, however, that Agency review shall be made within thirty (30) days after receipt of such writing, and *Provided*, further, that the only ma-

terial for which approval for publication may be withheld by the Agency is that material which the Agency determines to be classified.

The United States Marshal is hereby directed to serve a copy of this Order on the defendant, Frank W. Snepp III, and such other persons and/or corporations as the Department of Justice deems appropriate and so directs.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/ Oren R. Lewis
United States Senior District Judge

Supreme Court, U.S.
FILED
AUG 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1853

In the Supreme Court of the United States

OCTOBER TERM, 1990

FRANK W. SNEPP, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA L. HERWIG
DEBORAH RUTH KANT
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals erred in refusing to modify an injunction—which requires petitioner to submit writings relating to the CIA for prepublication review and which was upheld by this Court in *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam)—so as to place on the CIA the burden of initiating judicial proceedings to resolve disputes arising from prepublication review.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Alfred A. Knopf, Inc. v. *Colby*, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975)	12-13
Freedman v. *Maryland*, 380 U.S. 51 (1965)	8
FW/PBS, Inc. v. *Dallas*, 110 S. Ct. 596 (1990)	12
McGehee v. *Casey*, 718 F.2d 1137 (D.C. Cir. 1983)	12
Snepp v. *United States*, 444 U.S. 507 (1980)	2, 3, 4, 5, 9, 11
Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975)	8
System Fed'n No. 91 v. *Wright*, 364 U.S. 642 (1961)	9, 10
United States v. *Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972)	7, 8, 11, 12
United States v. *Morison*, 844 F.2d 1057 (4th Cir.), cert. denied, 109 S. Ct. 259 (1988)	13
United States v. *Snepp*, 595 F.2d 926 (4th Cir. 1979), rev'd in part, 444 U.S. 507 (1980)	4
United States v. *Swift & Co.*, 286 U.S. 106 (1932)	9-10
United States v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968)	10

Rule:

Fed. R. Civ. P. 60(b)(5)	9

Miscellaneous:

11 C. Wright & A. Miller, *Federal Practice and Procedure* (1973)	9

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1853

FRANK W. SNEPP, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 897 F.2d 138. The opinion of the district court (Pet. App. 13a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on February 27, 1990. The petition for a writ of certiorari was filed on May 29, 1990 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks further review of a decision declining to modify the terms of an injunction entered

against him in 1978. This injunction, which was affirmed by this Court in 1980, *Snepp* v. *United States*, 444 U.S. 507 (per curiam), requires petitioner to submit writings containing information relating to the CIA for prepublication review and effectively prohibits publication without the CIA's permission. Petitioner contends that the injunction should be modified to place on the CIA the burden of initiating judicial review of disputes arising from these procedures.

1. As a condition of employment with the CIA, employees sign agreements in which they promise (1) to submit writings containing information on CIA activities to the agency for prepublication review and (2) not to publish those materials without specific CIA approval. See C.A. App. 109-111. As this Court has noted, these agreements are an "integral part of" the employees' undertaking "not to disclose any classified information relating to the Agency without proper authorization." *Snepp* v. *United States*, 444 U.S. at 508. In 1977, the CIA established the Publications Review Board (PRB). Its function is to review the writings and proposed oral presentations of present and former CIA employees who are subject to prepublication review to determine whether those materials contain classified information or divulge intelligence data or activities of the CIA. C.A. App. 44, 109. The purpose of prepublication review "is to ensure that the manuscript contains no classified information that the author learned in the course of his employment." C.A. App. 43. The policy of the Board is to respond as rapidly as possible to prepublication submissions and to work closely with an author to find "acceptable unclassified alternatives that will allow

him to convey the message he wishes to publish." C.A. App. 43-44, 112.

2. When he joined the CIA in 1968, petitioner signed an agreement in which he promised that he would "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency." *Snepp* v. *United States*, 444 U.S. at 508. Upon leaving the CIA, Snepp also signed a termination agreement, reaffirming his promise not to reveal "any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of the Director of Central Intelligence or his representative." *Id.* at 508 n.1.

Petitioner violated his obligations to the CIA when he published a book about CIA activities without prior Agency approval. *Snepp* v. *United States*, 444 U.S. at 508. The CIA brought suit in the United States District Court for the Eastern District of Virginia, seeking to impose a constructive trust on profits derived from the book and to enforce the confidentiality agreements. Pet. App. 2a. The district court found that petitioner had "willfully, deliberately and surreptitiously breached his position of trust with the CIA and the [1968] secrecy agreement" and had "deliberately misled CIA officials into believing that he would submit the book for prepublication clearance." *Snepp* v. *United States*, 444 U.S. at 508. Based upon a determination that petitioner's publication of his book had "caused the United States irreparable harm and loss," the court entered the injunction at issue here and imposed a constructive trust on profits flowing from the book. *Id.* at 508-509.

The injunction prohibits petitioner from (Pet. App. 20a-21a)

> further breaching the terms and conditions of [his] Secrecy Agreement and fiduciary duty with the Central Intelligence Agency by failing to submit any manuscript or other writing containing information which relates to the Central Intelligence Agency, its activities, intelligence activities generally or intelligence sources and methods, which information the defendant gained during the course of or as a result of his employment with the Central Intelligence Agency, for Agency review prior to publication; *Provided*, however, that Agency review shall be made within thirty (30) days after receipt of such writing, and *Provided*, further, that the only material for which approval for publication may be withheld by the Agency is that material which the Agency determines to be classified.

The court of appeals upheld the injunction and the findings on which it was based, but reversed the imposition of the constructive trust. *United States* v. *Snepp*, 595 F.2d 926, 935 (4th Cir. 1979), rev'd in part, 444 U.S. 507 (1980).

Petitioner and the United States cross-petitioned for further review. This Court upheld the injunction and reinstated the constructive trust on the profits from the book. *Snepp* v. *United States*, 444 U.S. at 516. The Court observed that petitioner's agreement was "an 'entirely appropriate' exercise of the CIA Director's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure.'" *Id.* at 509 n.3. The Court also found that the government "has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality

so essential to the effective operation of our foreign intelligence service." *Ibid.* Petitioner's agreement, the Court continued, was "a reasonable means for protecting this vital interest." *Ibid.* In a footnote, the Court's opinion also stated (*id.* at 513 n.8):

> The dissent argues that the Court is allowing the CIA to "censor" its employees' publications. *Post*, at 522. [Petitioner's] contract, however, requires no more than a clearance procedure subject to judicial review. If [petitioner], in compliance with his contract, had submitted his manuscript for review and the Agency had found it to contain sensitive material, presumably—if one accepts [petitioner's] present assertion of good intentions—an effort would have been made to eliminate harmful disclosures. Absent agreement in this respect, the Agency would have borne the burden of seeking an injunction against publication. See *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362 (CA4), cert. denied, 421 U.S. 992 (1975); *United States* v. *Marchetti*, 466 F.2d 1309 (CA4), cert. denied, 409 U.S. 1063 (1972).

3. The present dispute stems from petitioner's submission of an outline of a potential television mini-series, entitled *Background: Lawcase Story*, for prepublication review. On November 22, 1985, as required by the injunction and his agreement, petitioner submitted this manuscript to the CIA. After some back-and-forth, the PRB issued a decision requiring 11 specific deletions from the manuscript before publication. Negotiations continued, and petitioner took an administrative appeal from the PRB's ruling. Ultimately, the CIA reversed the PRB with respect to all but one deletion. In the meantime, however, petitioner's television deal had fallen through. Pet. App. 4a.

Three years after submitting the manuscript for prepublication review, petitioner filed a motion in the district court seeking (1) an order to show cause why the government should not be held in contempt for failing to complete its review of the manuscript in the time required by the injunction, (2) damages, (3) an order disapproving the deletion required by the CIA, and (4) modification of the injunction to require the CIA to initiate judicial proceedings to resolve disputes arising from prepublication review. Pet. App. 5a, 14a.

The district court denied the contempt motion, finding that the CIA had made "substantial and diligent efforts in attempting to comply" with its obligations under the injunction. Pet. App. 17a. The court also declined to modify the injunction. After reviewing decisions by this Court that prescribe the standards governing such requests, the district court concluded that there had been "no appropriate showing by [petitioner] requiring modification or clarification." *Id.* at 18a. In addition, the court denied petitioner's request for damages and upheld the deletion in the manuscript that the CIA had prescribed. *Id.* at 17a, 18a.

4. On appeal, petitioner challenged only the district court's decision not to modify the injunction. The court of appeals affirmed. Pet. App. 1a-10a. The court noted that an injunction may be modified "where warranted by a change in the law or the circumstances," but that a district court's refusal to disturb a prior order is reviewable only for an abuse of discretion. *Id.* at 5a. Petitioner, the court stated, had not pointed to "a change in the law or circumstances which existed at the time his injunction was affirmed by the Supreme Court." *Id.* at 6a. Noting that petitioner was "essentially arguing that the

original decision in his case should have placed the burden on the CIA to seek judicial review," the court held that "[r]easserting the merits of his case does not * * * justify altering an injunction." *Id.* at 6a-7a.

The court also concluded that petitioner's request for modification of the injunction was foreclosed by *United States* v. *Marchetti*, 466 F.2d 1309, cert. denied, 409 U.S. 1063 (1972), a case in which the Fourth Circuit had held that a CIA employee should have the responsibility for initiating judicial review when disputes arise out of the CIA's prepublication review procedures. Pet. App. 7a-8a. The court rejected petitioner's contention that footnote 8 in this Court's *Snepp* opinion had overruled *Marchetti* and mandated placement of the burden of initiating review on the CIA. *Id.* at 9a-10a. The court of appeals explained that "[w]hile the language in the footnote arguably imposes on the CIA the burden of seeking an *injunction* by initiating a legal proceeding, such a requirement would not eliminate [petitioner's] burden to seek judicial review of the Agency's decision to withhold approval." *Id.* at 9a. The court added that the footnote had cited *Marchetti* with approval and that this Court "found the secrecy agreement enforceable and affirmed the injunction," indicating "that CIA approval is a precondition to publication." *Id.* at 10a.

ARGUMENT

The court of appeals declined to modify an injunction that this Court upheld on direct review. This decision does not conflict with decisions of other courts of appeals and presents no question of general importance warranting this Court's attention. Petitioner's assertion that a footnote in the Court's opinion upholding the injunction requires modification of that decree is without merit; the footnote cannot fairly be read to contradict the Court's disposition of the case. Further review is not warranted.

1. Petitioner's fundamental contention is that the injunction requiring him to submit his manuscripts for prepublication review improperly requires him to bear the burden of initiating judicial proceedings in the event of a dispute. In his view, the injunction should conform to the standards set forth by this Court in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). See Pet. 11-12. In those cases, the Court held unconstitutional procedures under which state and local authorities prescreened films and performances to determine their suitability for the public.

Both *Freedman* and *Southeastern Promotions* were decided years before petitioner sought direct review of his injunction in this Court. Moreover, in 1972, the Fourth Circuit held that not all of the procedures mandated by *Freedman* were required in the context of the CIA's program of prepublication review. *United States* v. *Marchetti*, 466 F.2d at 1317. With respect to the burden of initiating judicial review, *Marchetti* concluded (*ibid.* (emphasis added)):

> [S]ince First Amendment rights are involved, we think Marchetti would be entitled to judicial

> review of any action by the CIA disapproving publication of the material. Some such review would seem essential to the enforcement of the prior restraint imposed upon Marchetti and other former employees. [Citing *Freedman*] *Because of the sensitivity of the area and confidentiality of the relationship in which the information was obtained, however, we find no reason to impose the burden of obtaining judicial review upon the CIA. It ought to be on Marchetti.*

Petitioner was undoubtedly aware that his injunction would be applied in accordance with this ruling. Nevertheless, he chose not to seek review in this Court of the question whether the injunction was consistent with the principles set forth in *Freedman* and *Southeastern Promotions*; in fact, the petition cited neither case. See 78-1871 Pet. at 2. This Court rejected the claims that petitioner did raise and upheld the injunction. *Snepp* v. *United States*, 444 U.S. at 516.

It is well established that "a sound judicial discretion may call for modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *System Fed'n No. 91* v. *Wright*, 364 U.S. 642, 647 (1961); see Fed. R. Civ. P. 60(b)(5) (allowing relief from a final judgment when "it is no longer equitable that the judgment should have prospective application"). However, a request for modification of an injunction "is not a means by which a losing litigant can attack the court's decree collaterally." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2961, at 600-601 (1973). As this Court observed in *United*

States v. *Swift & Co.*, 286 U.S. 106, 119 (1932), in reversing an order modifying an injunction:

> The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.

See also *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). When a district court considers a request for modification of an injunction, "[a] balance must * * * be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances." *System Fed'n No. 91* v. *Wright*, 364 U.S. at 647-648. Necessarily, "[w]here there is such a balance of imponderables there must be wide discretion in the District Court." *Id.* at 648.

Both lower courts adhered to these general principles. The district court recognized that it had authority to modify the injunction to accommodate changed circumstances, but found that petitioner had made "no appropriate showing * * * requiring modification or clarification." Pet. App. 18a. The court of appeals correctly limited its review to "an abuse of discretion standard." *Id.* at 5a. It held, *inter alia* (*id.* at 6a-7a):

> [N]othing [petitioner] cites is a change in the law or the circumstances which existed at the time his injunction was affirmed by the Supreme Court. He is essentially arguing that the original decision in his case should have placed the burden on the CIA to seek judicial review. Reasserting the merits of his case does not, however, justify altering an injunction.

This determination, which is sufficient to sustain the court of appeals' judgment regardless of the merits of petitioner's constitutional contentions, presents no question warranting this Court's review.

2. Footnote 8 in the Court's opinion in *Snepp* v. *United States*, *supra*, does not require modification of the injunction. In the first place, the footnote cannot fairly be construed to contradict the Court's disposition of the case. Second, the footnote does not even address the issue presented by petitioner's request for modification of his injunction; it does not say that an injunction entered against an individual who has violated his agreements with the CIA must place the burden of initiating judicial review on the agency. Rather, addressing the hypothetical case that would have arisen had petitioner submitted his manuscript for review and thereafter threatened to publish it, the footnote observes that the CIA "would have borne the burden of seeking an injunction against publication." 444 U.S. at 513 n.8. That proposition provides no support for petitioner's position that the CIA invariably has the burden of initiating review. The footnote acknowledges that if an employee seeks to publish without obtaining CIA approval, the agency has the burden of seeking an injunction. However, if the employee believes that approval has been improperly withheld and wishes to obtain a court order permitting publication, he must seek it. That was the holding of *Marchetti*—a decision that found "no reason to impose the burden of obtaining judicial review upon the CIA" (466 F.2d at 1317). In footnote 8, this Court cited *Marchetti* with approval; the footnote cannot reasonably be read to establish the exact opposite proposition.

As the court of appeals concluded, footnote 8 does not require the Fourth Circuit to abandon *Marchetti*

as the law of the circuit or compel modification of the injunction.

3. Finally, even if it were properly presented in this case, the question whether the CIA should bear the burden of initiating judicial proceedings to resolve disputes arising from agreements calling for prepublication review would not call for the Court's attention. At bottom, petitioner's position rests on the proposition that there is no constitutionally significant difference between the arrangements that the CIA has adopted to safeguard classified information and schemes providing for preclearance of movies and other forms of public entertainment.

Nothing in the Court's decisions supports that proposition,* and *Marchetti*—the one court of appeals decision to address it squarely—rejected it. The precise equivalent of the procedures required by *Freedman* was not mandatory in this area, the *Marchetti* court found, in view of "the sensitivity of the area and confidentiality of the relationship in which information was obtained," the limited need for judicial review in light of the "narrow areas for possible disagreement," and the authority that the Executive exercises in the conduct of foreign relations and intelligence matters. 466 F.2d at 1317. Other decisions addressing the legality of the CIA's prepublication review procedures cast no doubt on *Marchetti*. Indeed, they have uniformly upheld the constitutionality of the CIA's confidentiality agreements, recognizing the important interests that strict compliance with those agreements serve. See *McGehee* v. *Casey*, 718 F.2d 1137, 1140 (D.C. Cir. 1983); *Alfred A. Knopf, Inc.*

---

* Cf. *FW/PBS, Inc.* v. *Dallas*, 110 S. Ct. 596, 606 (1990) (declining to require "full procedural protections set forth in *Freedman*" for licensing scheme for adult businesses).

v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975). See also *United States* v. *Morison*, 844 F.2d 1057, 1068-1069 (4th Cir.), cert. denied, 109 S. Ct. 259 (1988).

Petitioner argues that his injunction should be modified to conform to a Department of Justice regulation governing employees with access to classified information. Pet. 16-18. However, the procedures mandated by the regulation are not constitutionally required. Petitioner presented no considerations justifying modification of the injunction, and the court of appeals correctly ruled that it was not an abuse of discretion to refuse to amend it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA L. HERWIG
DEBORAH RUTH KANT
Attorneys

AUGUST 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20041

Supreme Court, U.S.
FILED
AUG 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1853

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FRANK W. SNEPP, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONER

WILLIAM H. ALLEN
MARK H. LYNCH *
STEVEN F. REICH
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Petitioner

* Counsel of Record

BEST AVAILABLE COPY

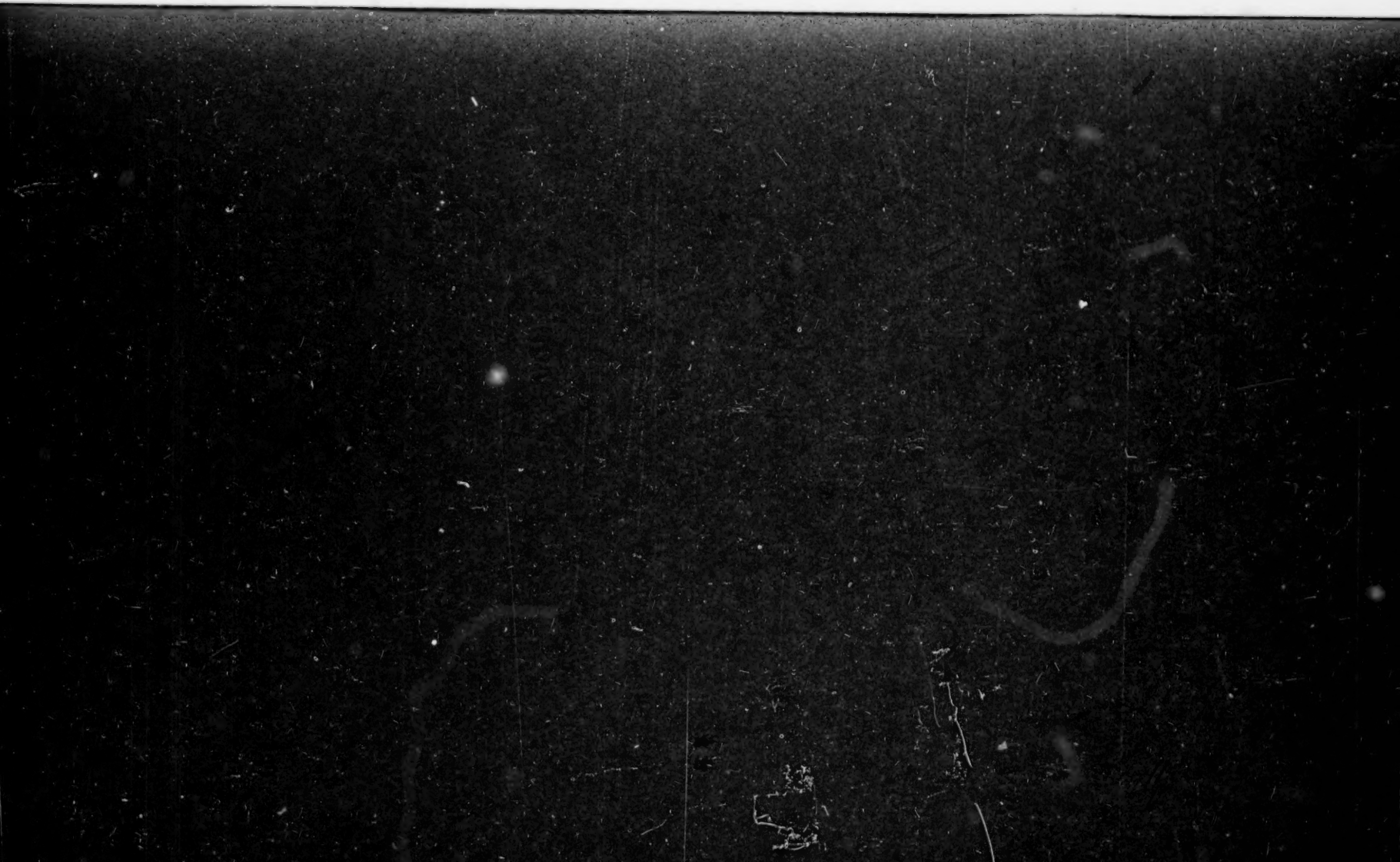

TABLE OF AUTHORITIES

Cases: Page

Alfred A. Knopf, Inc. v. *Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975) 5

Freedman v. *Maryland*, 380 U.S. 81 (1965) 4, 6

McGehee v. *Casey*, 718 F.2d 1137 (D.C. Cir. 1983) .. 5

Padula v. *Webster*, 822 F.2d 97 (D.C. Cir. 1987) 6

Snepp v. *United States*, 444 U.S. 507 (1980) .....*passim*

Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 6

United States v. *Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) 4, 5. 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1853

FRANK W. SNEPP, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONER

The government's position on the meaning of footnote 8 of this Court's opinion in *Snepp* v. *United States*, 444 U.S. 507, 513 n.8 (1980), is untenable. When that fact is understood, all of the reasons offered by the government for not taking this case fall.

I

The decision below cannot be reconciled with the Court's statement in footnote 8 that the CIA bears "the burden of seeking an injunction against publication" when the Agency and a former employee cannot agree on Agency-suggested deletions. What appears to be the government's attempt at reconciliation (Br. in Opp. 11) turns out to be just words. The government starts out by saying that

footnote 8 "does not say that an injunction entered against an individual who has violated his agreements with the CIA must place the burden of initiating judicial review on the agency." Rather, the government says, the footnote addressed the "hypothetical case that would have arisen" if Snepp had "submitted his manuscript for review and thereafter threatened to publish it."

That sounds like the introduction to an argument that the person who violates a law or breaches a contract cannot complain that he is constrained more stringently by a remedial order than he would be by the law or the contract itself. But that is not the government's argument, and such an argument in this case would be empty because the injunction is as silent on the existence of judicial review—let alone who has the burden of seeking it—as Snepp's secrecy agreement itself. And the injunction was entered to enforce the agreement, 444 U.S. at 509, not to enlarge whatever restrictions it imposed on Snepp.

The Court's statement in footnote 8 that the agreement placed the burden of judicial enforcement on the CIA was part of a response to an assertion in the dissent that the Court was "allowing the CIA to 'censor' its employees' publications." No, said the majority, the secrecy agreement "requires no more than a clearance procedure subject to judicial review." And the review is initiated by the Agency; it bears "the burden of seeking an injunction against publication." The Court did not add, "Of course, the injunction we are affirming establishes quite a different regime of judicial review, one in which Snepp bears the burden of going to court to seek review of any proposed deletion with which he does not agree." The Court did not say that because there was no basis in the injunction, textual or otherwise, for saying it and because the constitutional considerations that led the Court to place upon the Agency the burden of going to court under the secrecy agreement apply equally to an injunction entered to enforce such an agreement.

The government's argument on the meaning of footnote 8 cannot be based on the distinction between agreement and injunction because there is none with respect to the obligations they impose on Snepp. The distinction the government does draw is puzzling and, if we have understood it, insupportable. After the introductory sentences quoted above, the government says that footnote 8 "acknowledges that if an employee seeks to publish without obtaining CIA approval, the agency has the burden of seeking an injunction" (Br. in Opp. 11); but then the government adds that, "if the employee believes that approval has been improperly withheld and wishes to obtain a court order permitting publication, he must seek it." (*Id.*)

That, of course, is not at all what footnote 8 means, for it says nothing about threats to publish without approval or employees seeking court orders. The footnote says that if Snepp had submitted his manuscript for review, if the Agency had found it to contain sensitive material, and if Snepp and the Agency had tried to reach agreement on eliminating harmful disclosures and had not succeeded—"[a]bsent agreement to that effect"—"the Agency would have borne the burden of seeking an injunction against publication." In this case Snepp did submit his manuscript for clearance, the Agency found sensitive material, there was an effort to agree on deletions, the effort failed—and yet it was Snepp who was required to seek judicial review. The Agency did not bear "the burden of seeking an injunction against publication," as the footnote says it should have.

The government also asserts that footnote 8 "cannot fairly be construed to contradict the Court's disposition of the case." (Br. in Opp. 11.) The suggestion is that, because the Court affirmed the injunction, it could not have meant to place on the Agency the burden of seeking judicial review over subsequent disagreements. The suggestion erroneously assumes that the injunction said

something about judicial review inconsistent with the judicial review procedures that the Court said in footnote 8 were properly read into the agreement to keep a "clearance procedure" from constituting unconstitutional censorship. In fact, the injunction says nothing about judicial review.

II

In its argument on the merits, its argument that there has been no such change in law or factual circumstances as to justify a modification of the injunction, and its argument that the question presented does not call for the Court's attention, the government relies heavily on the decision of the court below in *United States* v. *Marchetti*, 446 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). In *Marchetti*, the court, construing a secrecy agreement, said that CIA employees who sign such agreements retain certain rights guaranteed by the First Amendment. Drawing on *Freedman* v. *Maryland*, 380 U.S. 81 (1965), the court said that the CIA must complete its review of a manuscript within 30 days and can withhold approval only for information that is classified. *Marchetti*, 466 F.2d at 1317. The court also said that the employee was entitled to judicial review, but that it found "no reason to impose the burden of obtaining judicial review upon the CIA" and that the burden "ought to be" on the employee. *Id.* As we have seen, that is the opposite of what this Court said in footnote 8 of *Snepp*. The change in the law occurred when this Court made its decision in *Snepp*.

Snepp's injunction contains two provisos incorporating the two rights *Marchetti* had read into the secrecy agreement. What is sought here is a third proviso that accords with this Court's *Snepp* decision on the issue of judicial review. It is no answer to that request to say that the injunction when it was entered was informed by the *Marchetti* decision. Footnote 8 of *Snepp* means that *Marchetti* was mistaken in its allocation of the burden

of seeking judicial review. After *Snepp*, the judicial review terms of secrecy agreements and injunctions entered to enforce them is guided by this Court's decision and not by *Marchetti*, and Snepp's injunction should be amended accordingly.

III

Marchetti cannot stand "as the law of the circuit" (Br. in Opp. 12) after *Snepp*. And it is immaterial, after *Snepp*, that "*Marchetti* . . . rejected" the proposition that "the CIA should bear the burden of initiating judicial proceedings to resolve disputes arising from agreements calling for prepublication review." (*Id.*)

The government's extravagant rhetoric makes *Marchetti* no more material, and the rhetoric is in any event wrong. It is not "petitioner's position . . . that there is no constitutionally significant difference between the arrangements that the CIA has adopted to safeguard classified information and schemes providing for preclearance of movies and other forms of public entertainment." (Br. in Opp. 12) The very significant differences between classified information and forms of public entertainment, which petitioner fully recognizes, are accommodated by the substantial deference that reviewing courts afford to the CIA's censorship decisions. *See, e.g., McGehee* v. *Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983); *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1367-70 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975). Those differences do not, however, require that the burden of seeking judicial review be allocated differently because the allocation of that burden does not expose assertedly classified information to disclosure until judicial review is completed. Petitioner does not assert the right to publish willy-nilly, but only after he has given notice of his disagreement and the CIA has had a reasonable period to decide whether to take the matter to court, in which case Snepp could not publish until the conclusion of the litigation.

The government continues to insist in the teeth of footnote 8 that *Marchetti* was correct in placing the burden of seeking judicial review on former CIA employees because of "the sensitivity of the area and confidentiality of the relationship in which information was obtained." 466 F.2d at 1317. However, the Department of Justice, which has more expertise in these matters than the Fourth Circuit, has determined that it will bear the burden of seeking judicial review in the case of former FBI agents, who, as a former Deputy Attorney General observed, "perform counterintelligence duties that involve highly classified matters relating to national security." *Padula* v. *Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (Silberman, J.). It is therefore clear that "the sensitivity of the area and confidentiality of the relationship in which information was obtained" do not require distortion of the constitutional principle established in *Freedman*, 380 U.S. 81, and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), that censors must bear the burden of seeking judicial review when authors dispute their decisions. *Snepp* accords with that principle. *Marchetti* does not. There is no doubt which prevails. This Court should say so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. ALLEN
MARK H. LYNCH *
STEVEN F. REICH

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Petitioner

* Counsel of Record